CHAN SAU CHUAN

v.

CHOI KONG CHAW & YAP YUN CHAN

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. S7-25-43-88]
20 NOVEMBER 1990

TORT: *Negligence - Collision of vehicles travelling in opposite directions - Presumption - Whether burden of proof discharged - Sketch plan and key by investigating officer - Plaintiff medically unfit to give evidence - Whether Extrinsic evidence explaining contents of sketch plan - Whether admissible - Expertise of witness - Probativeness of defendant's evidence - Scratch marks - Exposed rim of off-side wheel - Evidence Act 1950 ss. 91, 92 - Road Traffic Ordinance 1958, s. 140A.*

The accident in this case occurred between two cars along the Ipoh/Kuala Lumpur Highway (the said highway) on 28 July 1986. The first defendant D1 was the driver of the red vehicle going to Kuala Lumpur and the white vehicle was driven by the plaintiff C towards Ipoh. Except for certain agreed special damages, liability and damages were disputed. The plaintiff's case rested solely on the evidence of PW3, the Investigating officer of the accident. PW3 drew a fully detailed sketch plan and key of the scene of the accident.

PW3 said that the scratch marks on the right half of the said highway was made by D1's car; his evidence was not shaken in cross-examination. In his case D1 called the police photographer who took photographs of the vehicles, the stretch of the road and the position of the red car. D1 also testified and claimed that C's car encroached on his side of the highway; he lodged a police report on 31 August 1986. D1's testimony as to the spot where the alleged collision took place did not tally with PW3's evidence on this issue. D1 also indicated on the sketch plan the positions of the cars. C was unable to give evidence as he was medically unfit. The weather was foggy at the time.

Citing two cases *Ong Yam Chong & Anor. v. Chan Wah* and *Mohamed Abdullah v. Chah Hea Seng,* Counsel for D1 contended:

(a) that C had failed to discharge his burden of proving negligence as he had not given any evidence;

(b) that PW3's evidence as to the scratch marks being caused by D1's car should be rejected because although the point marked 'N' did show some scratch marks, the sketch plan did not show that the said marks extended to D1's car as marked in the sketch plan; in addition although in the sketch plan it was said that N indicated the spot where the scratch marks were found, the words in the sketch plan went on to say that the scratch marks faced Ipoh - not that the scratch marks came from D1's car. Counsel contended that under ss. 91 and 92 of the Evidence Act 1950 (the Act) and s. 140A of the Road Traffic Ordinance (the Ordinance) PW3 was precluded from adducing evidence in proof of the contents of the sketch plan except the sketch plan itself or to adduce evidence to contradict, vary, add to or subtract from its contents.

Held:

[1] The two cases cited by Counsel in (a) above do not lay down any legal presumption - see Thomas CJ in the *Ong Yam Chong* case at p. 187. The Court is therefore not precluded from examining the totality of evidence before arriving at a just and fair conclusion.

[2] In relation to contention (b) above:

(a) Under s. 140A of the Ordinance, the sketch plan and key are not required to be reduced into writing; neither do these documents need to be reduced into writing under Chapter XIII of the Criminal Procedure Code (CPC). The sketch plan was only an informal document compiled by PW3 to assist him in his investigation of the accident.

(b) Consequently, the sketch plan with the key does not come within the restriction of s. 91 of the Act and extrinsic evidence is admissible in substitution of any document intended to operate as a collateral or informal memorandum of a transaction.

(c) Even if the sketch plan and key falls within s. 92 of the Act (to which the trial Judge cannot accede) extrinsic evidence can still be permitted to be adduced to explain the contents of the sketch plan and the key firstly if the Court is satisfied that the sketch plan and key are not complete and an explanation is required from the maker and secondly, by virtue of proviso (f) to s. 92 of the Act.

[3] PW3 was skilful enough for the Court to take into consideration some of the things said in his evidence. His statement that the scratch marks followed D1's car merely means that in his opinion, the scratch marks points at the direction of D1's car and not that there were continuous scratch marks seen from point N to D1's car; had there been such scratch marks, PW3 would have drawn them on the sketch plan.

[4] (a) D1's evidence was vague, evasive and inconsistent, especially in relation to the point where he claimed C1's car encroached on his side of the road.

(b) As there is no evidence that D1 had taken any evasive action the most that could be said in favour of D1 was that had C's car been encroaching on the wrong side of the road when D1 negotiated the bend he would certainly not have been able to avoid colliding with C's car and his car would in the natural course of events, be pushed to the left side of the highway at the spot where the collision occurred; his car would not be straddling the left half of the said highway facing Kuala Lumpur.

(c) It is impossible in the natural course of events that D1's car would have gone over to the wrong side of the highway as evidenced by the scratch marks caused by the exposed rim of his offside wheel - the fact that it was the front off side rim of D1's car that caused the scratch marks clearly indicates that it was D1 who encroached onto C's path.

(d) D1 held 100% liable for the accident.

[5] Damages

(a) Fracture of radius and ulna RM8,000

(b) Fractures of the humerus RM20,000

(c) Brain injury RM100,000

(d) Pretrial loss of earnings RM12,250

(e) Future loss of earnings RM60,000

(f) C is not entitled to loss of earning capacity - the principle in *Ngooi Ku Siong v. Aidi Abdullah*, does not apply as since C had already lost his job the injuries sustained by him disabled him from working and in respect of that disability he has been compensated by loss of future earnings.

(g) Nursing care RM42,000

(h) Psychiatrist counselling RM25,000.

[Order accordingly.]

Cases referred to:
Ong Yam Chong & Anor. v. Chan Wah [1962] MLJ 184
Mohamed bin Abdullah v. Chah Hea Seng [1980] 2 MLJ 282
Ah Mee v. PP [1967] 1 MLJ 220
Chung Yoke Fah & Anor. v. BAB Mendis s/o B. Sebastian Mendis [1988] 1 MLJ xxxix
Ahmad Daman Huri bin Hussein v. Khoo Chin Yau [1990] 1 CLJ (Rep) 568
Ngooi Ku Siong & Anor. v. Aidi Abdullah [1984] 1 CLJ (Rep) 294

Legislation referred to:
Road Traffic Ordinance 1958, ss. 36(1), 140A
Evidence Act 1950, ss. 91, 92, 107
Criminal Procedure Code, ss. 112 to 114, 119(i)
Civil Law Act 1956, s. 28A

Other sources referred to:
Sarkar on Evidence 13th Edn. at p. 798, pp. 815, 816

For the Plaintiff - Arunachalam; M/s. Arun & Co.
For the Defendants - Shan Gnasalingam (Yap Foo Ken with him); M/s. Daim & Gamany

[**Editor's Note:**The defendants are appealing and the plaintiff is cross-appealing from the above decision]

JUDGMENT

Lim Beng Choon J:

A collision occurred between two vehicles on the morning of 28 July 1986 at about 5.30 a.m. along the Ipoh/Kuala Lumpur highway at the 69th km from Kuala Lumpur to Ipoh. One of the vehicles red in colour and bearing the number WAN 2687 was driven by the 1st defendant and he was on his way from Ipoh to Kuala Lumpur. The other vehicle white in colour and bearing number BCB 2033 was driven by the plaintiff and he was travelling from the opposite direction on his way to Ipoh.

Liability and damages are disputed except the following special damages which have been agreed by the parties namely the following items as specified in the particulars of special damages in the statement of claim of the plaintiff.

Items (a), (b) and (d) relating to costs of obtaining the various official reports and visits by family members to and from the General Hospital Kuala Lumpur have been agreed in the sum of RM1000.

Item (e) relating to damages to clothes has been agreed in the sum of RM50. Item (f) relating to transport expenses for plaintiff to attend follow up treatment has been agreed at RM64.

It has been further agreed that a sum of RM3000 be paid towards part of the medical expenses incurred by the plaintiff and two further sums of RM250 and RM420 be paid as expenses incurred in obtaining the Medical Reports from University Kebangsaan Malaysia and from Dr. Pritam Singh. Hence the total agreed special damages come to RM4784.

On the question of liability the plaintiff was able to call only one witness to testify on his behalf. That witness was one Hirdjat bin Kamaluddin (PW3) who was at the material time attached to the police station Kalumpang and who was the investigating officer of the

accident. The plaintiff himself was said to be medically unfit to testify as he had suffered severe brain injury as a result of the accident. I shall have more to say about his condition presently.

PW3 in his evidence in chief said that when he went to the scene of the accident he firstly studied the scene. He saw two cars at the scene and some scratch marks on the right half of the road as one faces Kuala Lumpur. Thereafter he drew a sketch plan of the scene of the accident and also made a key as to explanations of the various alphabetical markings and the relevant measurements of the distance between the said markings. The sketch plan and the key can be found at pp. 9 and 10 of Bundle A and they were tendered and marked as Exhibits P3 and P3K respectively. The accident took place at a sharp bend of that stretch of Ipoh/Kuala Lumpur highway at the 69th km. from Kuala Lumpur to Ipoh. If one were to travel from Kuala Lumpur to Ipoh one would be able see a car coming from the opposite direction but during a misty day one would not be able to see the car until it was a few feet away. He then proceeded to explain the various markings and measurements as shown in the sketch plan and the key. There was a double white line drawn in the centre of the stretch of the highway dividing the highway into two halves. The left half of the highway, as one faces Kuala Lumpur marked with the letter 'B' and 'C', was 11 feet wide. However at the edge of the left half there was a side gravel road marked with the letters 'A' and 'B' the width of which was 13 feet. A car could go on it. Therefore as one was travelling in a car from Ipoh to Kuala Lumpur there would be 24 feet of space for the car to manoeuvre. The width of the right half of the highway as one faces Kuala Lumpur marked with the letters 'C' and 'D' was also 11 feet with a side road at the edge of the highway marked with the letters 'D' and 'E' which road was 15 feet. Therefore as one was travelling from Kuala Lumpur to Ipoh he too had 26 feet of space to manoeuvre his car. The car bearing No. WAN 2687 as shown in the sketch plan and marked with the alphabet "LJMK" was straddling the left half of the highway as one faces Kuala Lumpur. The position of the other car bearing No. BCB 2023 was shown in the sketch plan as near to the side road of the right half of the highway as one faces Kuala Lumpur. The scratch marks on the right half of the road were marked with the letter 'N'. PW3 then went on to say that the scratch marks were made by a car and he said so because the said marks were fresh and white in colour and in his opinion the said marks could only be caused by a metal piece scratching the surface of the highway. The metal piece would dig up a bit of the tarred surface and leave a depression like on a small drain. From his further investigation he found that the scratch marks were made by the front offside rim of the car bearing No. WAN 2687. He could not find any other eye witness to the accident. He had issued a summons against the driver of the car bearing No. WAN 2687 under s. 36(1) of the Road Traffic Ordinance charging him for careless and inconsiderate driving. PW3 identified the 1st defendant as the person to whom he had issued the summons and he was formally charged at the Magistrate's Court in Kuala Kubu Bharu. PW3 did subpoena the plaintiff as witness in the traffic summons case but the subpoena was never served on the plaintiff because he was certified as medically unfit to testify. The case came up for mention before the said Court for no less than four times. In all the four occasions the plaintiff was unable to give evidence because he was certified to be medically unfit to testify. PW3 did not know what happened to the traffic summons case since the plaintiff was unable to testify. He, however, said that he issued the summons against the 1st defendant after he had completed the investigation of the case.

PW3 was subjected to severe cross-examination by the Counsel for the 1st defendant. However he persisted in saying that the scratch marks on the right half of the highway as one faces Kuala Lumpur were caused by the car bearing No. WAN 2687 because firstly the

tyre of the front offside wheel of the said car was punctured and the rim of that wheel was exposed. Secondly he said that the scratch marks followed the direction of the said car. He arrived at the conclusion based on his investigation which showed that the rim of the off-side wheel of the car bearing No. WAN 2687 was exposed due to the puncture of the tyre. PW3 had no doubt that the scratch marks on the right half of the highway marked by the letter 'N' followed the said car WAN 2687. Upon a suggestion made by Counsel that the scratch marks could have been made by any other vehicles other than the two vehicles involved in the accident, PW3 said that that was not possible because if there was an earlier accident he would have known of it. Moreover he had sent his officers to the scene even before his arrival at the scene at about 7.10 am.

In his re-examination he again said that it was obvious that the scratch marks were caused by the car bearing No. WAN 2687.

The evidence of the wife (PW4) of the plaintiff concerning liability confirmed that her husband could not go to Kuala Kubu Bharu Magistrate's Court because he was certified medically unfit to testify. The traffic summons case was postponed for 4 or 5 occasions and her husband never went to give evidence. Her husband used to return to Kuala Lumpur during the weekends. On the day of the accident her husband left Kuala Lumpur at about 5.15 am.

To rebut the case for the plaintiff the 1st defendant firstly called the police photographer Corporal Shamsuddin (DW1) to testify. DW1 said he took some photos of the vehicles involved and also one showing the stretch of the road and the position of the "red" car. The photographs were tendered and marked as Exhibits D4A to D.

Thereafter the 1st defendant testified on his own behalf (DW2).

In his examination in chief he said that on the day when the accident occurred he left Ipoh for Kuala Lumpur. He left Ipoh at about 4 am with his friend Yap Yun Chan (Yap) who was the owner of the car bearing No. WAN 2687 and who drove the car from Ipoh until they passed Bidor town when they stopped to have breakfast at a roadside stall. After they had their breakfast DW2 took over the driving of the car and they left the eating place at about 5.30 am. He was familiar with the Ipoh/Kuala Lumpur highway as he used to drive Yap's car to and from Kuala Lumpur to Ipoh almost every fortnight with his friend Yap. When the accident took place at about 6.30 am the road was very foggy. Since he was not in a hurry he kept to the speed of 40 km.p.h. At or near the place of the accident he could only see some 30 feet in front of him. He was keeping to the left side of the highway as one faces Kuala Lumpur. Upon reaching the place of the accident he saw the other car come from the front of him and the collision took place *before* the bend. He claimed that the other car encroached on his side of the highway. Because the other car was travelling so fast he could not take any evasive action. He lodged his report only on 31 August 1986. He could not lodge his report earlier because he could not walk as a result of the injuries sustained by him in the accident. His friend Yap was the owner of the car and the said Yap told him at the hearing of the Magistrate Court to inform him of the hearing of this case. However when this case came up for hearing he tried to contact Yap but he was told by Yap's mother that Yap had gone to Taiwan.

DW2 was also subjected to severe cross-examination by the Counsel for the plaintiff. Under cross-examination he said that after the accident he had not kept in touch with his friend Yap. Every time when he and Yap went to Ipoh they would take turns to drive Yap's car. He said that he was familiar with the Ipoh/Kuala Lumpur highway and that the accident took place at the 69th km from Kuala Lumpur to Ipoh. When asked as to why he did not say in his police report (see p. 2 of bundle 'A') that the plaintiff's car encroached onto his path,

the 1st defendant replied by saying that at the material time it never crossed his mind as he was in pain. He only recollected that the plaintiff encroached on to his path some six months after the accident while he was travelling again from Ipoh to Kuala Lumpur. He did not go back to the police to tell them about the encroachment simply because it did not dawn on him that he could make a supplementary report. He denied that it was his insurance company who instructed him not to plead guilty when he was charged at the Kuala Kubu Magistrate's Court. He admitted that Yap's car WAN 2687 was very badly damaged and that Yap himself was injured. When asked whether Yap lodged any police report he said yes but he did not know of the contents of his report. When asked how long after he took over the driving of the car before the accident took place he said that the accident happened at Kalumpang but he did not know the actual milestone. When asked at what speed he was driving when he approached the bend he said that he reduced his speed from 40 kmph. to 30 kmph. He was driving about 3 feet from the edge of the road marked in the sketch plan with the letter 'B'. The 1st defendant then drew a square on the sketch plan to show the position when the plaintiff's car encroached on his side of the road. When he was told by the Counsel for the plaintiff that at the spot where he drew the square the collision did not take place yet he insisted in saying that the place where he drew the square was where the collision took place. When he first saw the plaintiff's car it was in front of him. The 1st defendant was then negotiating the bend; it was foggy and his headlight was on. Suddenly the plaintiff's car encroached on his side of the highway. When Counsel for the plaintiff pointed out to him the scratch marks on the right half of the road marked with the letter 'N' was the spot where the accident took place he then resiled and said that the square earlier drawn by him only showed the point when the plaintiff's car encroached on his side of the highway and not the place of the accident. He admitted that the accident took place near 'N' and the 1st defendant then drew two squares on the sketch plan near 'N' to show the position of his car WAN 2687 and that of the plaintiff's car BCB 2023. The shaded square showed the position of his car and the unshaded square showed the position of the plaintiff's car. He admitted the front right tyre of his car was punctured and the rim was exposed but he denied that the scratched marks 'N' were caused by the rim of his car. He admitted that he had apologised to the plaintiff's wife about the accident because he was remorseful.

Under re-examination he said he saw that the tyre was still on the rim and the rim was a few inches from the ground. He apologised to the plaintiff's wife because he felt sorry for the condition the plaintiff was in and not because he was guilty. When Counsel for the plaintiff with permission of the Court asked the 1st defendant did he not in the Kuala Kubu Bharu's Court apologise to the wife of the plaintiff and said that he was on the wrong side of the road but he should not plead guilty because his insurance company told him that he should not do so he said he could not remember as it happened so long ago. But when the Magistrate queried him in chambers he told the Magistrate that he was not guilty.

Counsel for the plaintiff then tendered a letter from Dr. M. Mahadevan indicating that the plaintiff had failed to pay for his treatment since January 1989 till 5 April 1990. The total outstanding bill was RM7000. It was admitted by consent and marked Exhibit 'P5'.

In his submission on liability Counsel for the defendants relying on the case of *Ong Yam Chong & Anor. v. Chan Wah* [1962] MLJ 184 submitted that in collision which occurred with vehicles which were travelling in opposite directions then the *prima facie* presumption was that both drivers were negligent. The onus therefore fell on each of them to show that the other driver was negligent. This principle was confirmed by the Federal Court in the case of *Mohamed bin Abdullah v. Chah Hea Seng* [1980] 2 MLJ 282. He went on to say that the presumption being what it was, it was incumbent on both drivers in the present

case to adduce evidence to show who was negligent. The plaintiff had failed to discharge his burden as he had not given any evidence. If the plaintiff was suffering from mental disorder a guardian *ad litem* should be appointed. The next point taken up by the Counsel was that the evidence of the investigating officer PW3 who said that the scratch marks 'N' were made by the exposed rim of the defendant's car WAN 2687 and the marks followed up to where the car WAN 2687 came to a stop should be rejected because firstly although the point marked 'N' did show some scratch marks the sketch plan did not show that the said marks extended up to the defendant's car marked 'JKCM' in the sketch plan. Secondly although in the sketch plan it was said that 'N' indicated the spot where the scratch marks were found it went on to say "Tanda calar diatas jalanraya menghala ke Ipoh" and not that the scratch marks came from the defendant's car. By virtue of ss. 91 and 92 of the Evidence Act 1950 and s. 140A of the Road Traffic Ordinance 1958 PW3 was precluded from adducing evidence in proof of the contents of the sketch plan except the sketch plan itself or to adduce evidence to contradict, vary, add to or subtract from its contents.

In answer to the contention of the Counsel for the defence that by virtue of ss. 91 and 92 of the Evidence Act 1950, PW3 was precluded from adducing further evidence to prove the contents of the sketch plan except the sketch plan itself, I totally disagree with such a contention simply because s. 140A of the Road Traffic Ordinance 1958 does not provide that an Investigating Officer of a road traffic accident must reduce in writing the scene of the accident. In other words there is nothing in the said s. 140A to enjoin the Investigation Officer to put up a sketch plan at all. All that s. 140A provides is that the Investigation Officer may exercise any or all the special powers in relation to police investigation in seizable cases conferred on such investigating officer by Chapter XIII of the Criminal Procedure Code, and the provisions of ss. 112 to 114 of that Code shall apply to statements made by persons examined in the course of such investigation. Furthermore the matters that are required under Chapter XIII of the Criminal Procedure Code (CPC) to be reduced in writing are firstly the first information report and secondly statements recorded from witnesses or any other persons acquainted with the matter under investigation. It is also important to note that under s. 119(1) of the Criminal Procedure Code every police officer is required to enter his proceedings in the investigation in a dairy setting forth certain matters including "a statement of the circumstances ascertained through his investigation." But there is no evidence in the present case that the sketch plan and the key formed part of the contents of PW3's diary. The sketch plan with the key was only an informal document compiled by PW3 to assist him in his investigation of the accident. The sketch plan with the key does not therefore come within the class of statements or information that need to be reduced in writing and does not therefore come within the restriction of s. 91 of the Evidence Act 1950 and "extrinsic evidence is admissible in substitution of any document intended to operate as a collateral or informal memorandum of a transaction" - see *Sarkar on Evidence* 13th Edn. at p. 798. Furthermore even if it falls within s. 92 of the Evidence Act 1950 (to which I cannot accede) extrinsic evidence can still be permitted to be adduced to explain the contents of the sketch plan and the key if the Court is satisfied that the sketch plan and the key are not complete and an explanation is required from the maker thereof - see *Sarkar on Evidence* 13th Edn. pp. 815 and 816. I would go even further and say that even if the sketch plan and the key falls within s. 92 of the Evidence Act (to which I cannot accede as they are not required under s. 140A of the Road Traffic Ordinance or Chapter XIII of the Criminal Procedure Code to be reduced in writing) extrinsic evidence is still permissible to be adduced to explain their contents by virtue of proviso (f) to s. 92 which reads:

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

In *Sarkar on Evidence* 13th Edn. p. 871 the learned author commented on this proviso thus:

> Generally speaking, in cases of ambiguity or doubt as to its meaning extrinsic evidence of intimately connected facts or surrounding circumstances may be given in order to find out the real nature of the transaction in the document.

Earlier the learned author has said in his book at p. 802 that:

> Public documents are, in general, given no exclusive (nor conclusive) authority by law as instruments of evidence. Thus, an entry of marriage [*Evans v. Morgan*, 2C & J 453; *R v. Wilson*, 3F & F 119], or of the nationality of a ship [*R v. Seberg*, LR 1 CC 264] in a public register; or the certificate of the registration of a company, even when by statute rendered "conclusive evidence" [*Agri, Cattle Co. v. Fitzgerald*, 16 QB 432] will not exclude independent proof of those facts [Phip, 11th Edn. p. 790]. So the fact of birth, baptism, marriage [*Lady Limerick v. Ld Limerick*, 32 LJP & M 22], death or burial, may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers, which the law requires to be kept; for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care.

The Counsel for the defence relied on the case of *Ah Mee v. PP* [1967] 1 MLJ 220 but that case is easily distinguishable simply because there Ong Hock Thye FJ held that the trial Judge was wrong in allowing the witness to give extrinsic evidence to vary the contents of her first information report which under s. 107 of the Evidence Ordinance 1950 must be reduced in writing. Here we are dealing with documents which are not required by law to be reduced in writing. Notwithstanding my finding that the sketch plan and the key do not come within ss. 91 and 92 of the Evidence Act 1950, I still have to consider how much weight should I place on the evidence of PW3 and that I shall consider shortly.

As to the contention of the Counsel that in collision which occurred when vehicles were travelling in opposite direction then the *prima facie* presumption was that both drivers are equally negligent and the onus fell on each of them to show that the other driver was negligent and he relied primarily on two cases to support his contention namely *Ong Yam Chong & Anor. v. Chan Wah* (supra) and *Mohamed bin Abdullah v. Chah Hea Seng* (supra). These two cases to my mind do not purport to lay down any legal presumption, for as stated by Thomas CJ (one of the Court of Appeal Judges in the *Ong Yam Chong* case) at p. 187 of the reported case:

> I do not imagine that this case is likely to go elsewhere. My experience of local litigation, however, suggests to me that we may hear a great deal about it here in the future, and that being so I think I should make it clear *that in my view we are not treating the decisions of the English Court of Appeal in Baker v. Market Harborough Industrial Co-operative Society Ltd. and in France v. Parkinson as laying down any rule of law but rather as illustrative of the application of principles of logic and common sense to circumstances which do not infrequently arise.* (Emphasis is mine).

The Court is therefore not precluded from examining the totality of evidence before arriving at a just and fair conclusion.

Taking the evidence of the investigation officer, PW3, first I must mention that this witness has no personal interest in this action between the two parties. The second observation I would like to make is that although PW3 is not an expert witness in the strict sense of the words nevertheless he is more than competent to give his views because of his experience as an investigation officer in traffic accidents and the quality of the evidence he gave in this trial. To my mind he is skilful enough for this Court to take into serious consideration of some of the things said by him in his evidence. It is stated in *Sarkar on Evidence* 13th Edn., p. 521 that:

> It is the duty of the Judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered an expert. It is the Judge who is to decide the question of competency or fitness [*Bristow v. Secqueville*, 19 LJ Ex 289; *R v. Silverlock*, 1884, 2 QB 766; see *Sheo Tahal v. Arjun*, 56 IC 879 *ante*.] An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he has made a special study of the subject, or acquired a special experience therein.

In holding the view that the scratch marks were made by the exposed rim of the car WAN 2687 PW3 firstly said that the scratch marks were fresh and white colour. Whenever a metal piece scratched the surface of the road it would leave a whitish scratch marks. It would dig up a bit of the road and leave a depression like a small drain. Secondly he said quite firmly and explicitly that the offside front wheel rim of the car WAN 2687 was exposed and it was this exposed rim that caused the scratch marks. Although there is evidence to show that the tyres of the front wheels of the plaintiff's car BCB 2023 were also punctured there is no evidence to show that its rims were also exposed. Next he said with equal emphasis that the scratch marks followed the said car WAN 2687. This statement of his to my mind merely means that in his opinion the scratch mark points at the direction of the defendant's car WAN 2687 and not that there were a continuous scratch marks seen from point 'N' to the vehicle WAN 2687. Had there been such scratch marks no doubt PW3 would have drawn them on the sketch plan. As regards to plaintiff's failure to testify I am fully satisfied that due to the serious brain injury he is totally incapable of testifying at the trial of this case. The seriousness of the brain injury, as can be seen later, completely disabled him to testify on his own behalf. I disagree that in the circumstances a guardian *ad litem* must be appointed as I do not see what assistance could such a guardian give to the Court concerning liability.

Turning to the evidence of the 1st defendant, DW2, I am satisfied from the manner in which he gave his evidence and the quality of his evidence that he is an unreliable witness. His evidence is vague, evasive and also speckled with some inconsistencies. First he said that the accident took place before the bend which of course is not correct. He knew that the accident took place at or within the bend. Then he said that while he was attending Court in Kuala Kubu Bharu, Yap, his friend who is also the second defendant, asked him to inform the latter of the date of hearing of this case and when he called him up he was told by Yap's mother that he had gone to Taiwan. But under cross-examination he said this:

> After the accident I had not kept in touch with him (Yap). (The word within parenthesis is mine).

He also said that Yap had also lodged a report but according to PW3, Yap had never lodged a report. If anyone would know whether Yap had lodged a report or not, it must surely be PW3 the Investigating Officer. These vague and inconsistent assertions are not by themselves of any great significance. But reading these vague and inconsistent assertions with one final important vague and evasive assertion I am convinced that DW2 is not a witness of the truth. The final vague and evasive assertion came about when he drew the first square to

show the point where he claimed that the plaintiff's car encroached on to his side of the road - it is some distance from the point of impact shown by the letter 'N' indicating the spot where the scratch marks were seen. His evidence relating to this aspect of the case is important and it is useful for me to set out the questions posed by Counsel for the plaintiff and the answers given by DW2:

Q: (After DW2 had drawn the said square) But the collision did not take place yet?

A: It was already in front of me. *The place where I drew the square was where the collision took place.*

Q: When you first saw the car how far were you away from that car?

A: *It was already in front of me.* I came from a bend.

Q: When you first saw the car what was the distance?

A: I don't know. It negotiated a bend, it was foggy my headlight was on and suddenly the plaintiff's car encroached on my side.

Q: Can you see the scratch made on the sketch plan?

A: Yes.

Q: It was the police officer's evidence that that mark was made by your car you agree?

A: I heard what the police officer said. The square which I drew indicates ***the position of the plaintiff's car encroaching on to my line and not the place where the accident*** took place.

Q: Where then the accident happened?

A: Near the spot 'N'. It took place near 'N'. (Witness draws a mark to show where the accident took place - he draws the position of his car and that of the plaintiff's car at the place of collision. The shaded one is the witness's car and the unshaded is the plaintiff's car).

The aforesaid question and answers are clearly indicative that DW2 was trying to inject into the trial vague evidence to protect himself. Bearing in mind that he had earlier said that notwithstanding the fog he could still see 30 feet in front of him, then it must follow that he first saw the plaintiff's car encroaching on his side at least 30 feet away from the point of collision. If that be so he had sufficient time to take some evasive action by swerving to his left on to the side gravel road marked by "A" and "B" on the sketch plan, the width of which was 13 feet. Yet there is no evidence to show that he did take such action. Had there been such evasive action taken by DW2 the damages to both cars would not be so serious as to suggest an almost headlong collision. It may well be true that whether DW2 could take evasive action or not must depend on the speed of both cars. DW2 had said he reduced his speed to 30 km.p.h. before negotiating the bend and he *did not* say that the plaintiff's car was being driven at a high speed. In any event bearing in mind that the plaintiff was quite familiar with that stretch of road and the weather condition it is incredible that he would have driven at an unreasonable speed at that stretch of road when the vision of a driver would be highly restricted by the foggy weather condition. As there is no evidence that DW2 had taken any evasive action, the most that could be said in favour of the 1st defendant was that had the plaintiff's car been encroaching on the wrong side of the road when the 1st defendant negotiated the bend he would certainly not have been able to avoid colliding with the plaintiff's car. His car would in the natural course of event be pushed to left side of the highway at the spot where the collision occurred. His car would not be straddling the left half of the highway as one faces Kuala Lumpur. More importantly it is impossible in the

natural course of events that the defendant's car would have gone to the wrong side of the highway as evidenced by the scratch marks caused by the exposed rim of his off-side wheel. The fact that it was the front off side rim of the defendant's car that caused the scratch marks clearly indicates that it was the 1st defendant who encroached on to the path of the plaintiff. I accept such a proposition not only because of the evidence of the investigation officer PW3 but also because of the vague and evasive evidence of DW2. In the ultimate analysis I am satisfied that the accident was caused solely by the negligence of the 1st defendant who encroached on to the path of the plaintiff giving the latter no time to take evasive action because of the foggy atmosphere at the time of the collision. I therefore hold the 1st defendant 100% liable for the accident.

The next issue to determine is the quantum of damages. In assessing the damages for pain and suffering and lost of amenities, the injuries suffered by the plaintiff on admission to the Hospital Besar Kuala Lumpur were as follows:

(1) Head injury

(2) Close fracture right radius and ulna

(3) Close fracture midshaft of left humerus

(4) Close fracture medial condyle of (L) humerus.

There is no dispute that metal plates were inserted and screwed to the fractured right radius and ulna as well as the two fractures in the humerus in order to ensure that the fractures could be united and the upper limbs would return to normal. According to the report furnished by Pritam's Orthopaedic and Accident Surgery Clinic dated 19 May 1988 (see pp. 12 to 14 of Bundle A) the fractures were united with satisfactory function of the upper limbs but the plaintiff might be predisposed to the development of post traumatic osteoarthritis of the left elbow. The quantum of damages in respect of fractures of radius and ulna is between RM6500 to RM8000 (see *Tan See Peng v. Tong Yong Muang* per judgment of F.A. Chua J in Singapore Civil Suit No. 1055 of 1980 (unreported) and *Chung Yoke Fah & Anor. v. BAB Mendis s/o B. Sebastian Mendis* [1988] 1 MLJ xxxix). I therefore award a sum of RM8000 in respect of the radius and ulna fracture. As regards to the two fractures of the humerus I award a sum of RM16,000. However I have to take into consideration the element of overlapping award. From the sum of RM24,000 for the fracture I have to deduct a sum of RM4000 leaving a sum of RM20,000.

The next item in the damages for pain and suffering and loss of amenities is the brain injury. From the evidence of Dr. Fadzil Abdullah Cheah, the Associate Professor and Consultant Neurosurgeon of the University of Kebangsaan Malaysia (PW1) who treated the plaintiff, there is no doubt that the plaintiff has suffered a severe closed head injury. This witness confirmed what he had said in his specialist medical report dated 22 July 1988 (Exhibit P1) and it is this:

> In summary, Mr. Chan has suffered a severe closed head injury with permanent brain damage. Though he has made a good physical recovery, the gross deterioration in his intellect and memory, and in particular the change in his personality with impulsivity and depression has rendered him incapable of resuming his previous employment or for that matter to undertake any other form of employment.

The plaintiff's wife (PW4) summed up the condition of the plaintiff in these words (see pp. 16 - 17 of the Notes of Proceedings):

He was very active man; he played badminton, he swam, he went for jogging. At one point of time he was a champion swimmer - he swam across the channel from Penang to Butterworth a couple of times. He was an extraordinary strong man. After the accident he is a totally changed man. He likes to be left alone in a corner of my house and he refuses to talk. I find it difficult in communicating with him. I have to persuade him to bathe and I have to bathe him. I have to remind him to eat and at time I have to feed him like a child. I have to persuade him to eat as if he is a baby. He is not able to take care of himself. I have no one to help me to look after my husband. I found security with him before the accident; he gave me emotional support. It is no longer the same after the accident. We had happy sexual relation before the accident. It is no longer the same after the accident. He is very depressed man. He has talked to me about committing suicide.

As I have said in dealing with the case of *Ahmad Daman Huri bin Hussein v. Khoo Chin Yau* [1990] 1 CLJ (Rep) 568 that when a normal healthy person has been reduced to a living body without a spirit and also has been deprived of any enjoyment of life a higher award is justifiable. In the present case I think RM100,000 is appropriate for the brain injury.

The next head of damages is pretrial loss of earnings. There is no dispute that:

(a) the plaintiff was 49 years old at the time of the accident which occurred on 28 July 1986;

(b) the plaintiff's salary together with bonus was about RM3500 per month;

(c) he worked for Caltex Oil (Malaysia) Ltd. and his retiring age was 55 years and therefore he would retire on 6 July 1992 as he was born on 6 July 1937;

(d) he had been paid full paid leave for 7 months after the accident and 1/2 pay for another 7 months thereafter;

(e) he was not paid any salary after 30 September 1987;

(f) he was paid a gratuity of RM47,000 when he was medically boarded out;

(g) had he retired at the age of 55 years he would receive RM51,000 as gratuity;

(h) his living expenses came up to no more than RM1000 per month and the rest of his salary together with bonus he gave it to his wife, PW4, for household and his children's expenses.

From the abovementioned undisputed facts it is clear that the plaintiff did not suffer any loss of earnings from 28 July 1986 (the date of the accident) till 28 February 1987. From 1 March 1987 till 30 September 1987 he had only received one half of his salary plus bonus. He therefore had lost a sum of RM1750 for 7 months which would come to RM12,250. In respect of actual loss of pretrial earnings I therefore award a sum of RM12,250.

I shall now turn to future loss of earnings. Under the amended Civil Law Act s. 28A effective from 1 October 1984 provides *inter alia* that:

(1) the multiplier should be 55 minus the age of the victim at the time of the accident which in this case is 49 and divide the remainder by 2. In this case therefore the multiplier to be used cannot exceed 3 years or 36 months;

(2) the Court is also enjoined to take into consideration *inter alia* any diminution of any such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured.

Bearing in mind that at the date of the trial the plaintiff had reached the age of 50 years I think 2 years' purchase is the proper multiplier to be used for assessing the loss of future earnings. Out of his monthly earning I have held that his living expenses amount to RM1000. Therefore he would have only RM2500 which he could use to give to his family. The award for loss of future earnings is therefore RM2500 x 12 x 2 = RM60,000.

As regards to the claim for loss of earning capacity I do not think that in the circumstances of this case the plaintiff is entitled to loss of earning capacity. As stated by the then Federal Court in *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1984] 1 CLJ (Rep) 294 at 298.

> It (loss of earning capacity) arises where there is a *residual risk* that the plaintiff might be thrown out of work altogether at some future date. *The risk must be real and not speculative or fanciful.* (Words in parenthesis are mine. Emphasis also supplied).

At p. 300 of that reported case the Federal Court went on to say:

> The learned Judge followed the test applied in *Moeliker v. A. Reyrolle & Co. Ltd.* which states that a claim for loss of earning capacity is only available when the plaintiff was in employment. The word "only" should be corrected and read as "generally" since the statement is erroneous. (See Browne LJ's later view in *Cook v. Consolidated Fisheries Ltd*.) It is therefore immaterial whether the plaintiff was or in or out of employment at the time of the trial so long as the Court is satisfied *there is substantial or real risk that he will some time at the end of his working life lose his job or get a less paid employment because of the effect of the injuries sustained.* (Emphasis is mine).

The legal principle, laid down by the Federal Court in the abovementioned case (as I understand it) is that it must be shown that there is substantial or real risk that the victim of an accident *will some time during end of his working life* lose his job or get a less paid employment because of the injuries sustained. In the present case there is no risk at all that some time in future the plaintiff would lose his job or get a less paid employment simply because he had already lost his job slightly more than a year after the accident. The injuries sustained by him disabled him from working and in respect of that disability he had been compensated by loss of future earnings.

The next head of damages is nursing care. I have no doubt at all that in the circumstances of the case nursing care is necessary. According to all the specialist reports the plaintiff's personality has undergone a radical change - from a normal active person who was keen in all types of sport especially swimming he is now reduced to a depressed person and at times can be aggressive and hostile to his wife and daughter. His wife said in evidence:

> I have to persuade him to bathe and I have to bathe him. I have to remind him to eat and at times to feed him as if he is a baby. He is not able to take care of himself.

Her assertion is backed up by Dr. M. Mahadevan's report dated 25 May 1988 (see pp. 15 to 17 of bundle A).

Under this head of damages I am satisfied that an award of RM350 per month for a period of 10 years is warranted. The amount therefore is RM350 x 12 x 10 = RM42,000.

I am also satisfied that in his condition, the plaintiff will require psychiatrist-counselling-therapist for the rest of his life to prevent his depression from getting out of hand (see Dr. M. Mahadevan's report p. 17 of Bundle A). An award in the sum of RM25,000 is justified. In addition expenses for removal of steel plates and screws at some time in the future would require the plaintiff to expend some RM4000. It is to my mind reasonable to expect the plaintiff

in his depressed condition to be under the care of private specialist where he need not have to wait for his turn to remove the said plates and screws. I therefore award him a sum of RM4000 under this head of damages.

Now to sum up the awards as stated above:

(1) Pain and suffering in respect of the fractures of radius and ulna and humerus	-	20,000
(2) Pain and suffering in respect of brain injury	-	100,000
(3) Pre-trial loss of earnings	-	12,250
(4) Post trial loss of future earnings	-	60,000
(5) Nursing care	-	42,000
(6) Psychiatrist counselling	-	25,000
(7) Removal of steel plates and screws	-	4,000
(8) Agreed special damages	-	4,784
Total		268,034

From the above awards the special damages of pretrial loss of earnings of RM12,250 and agreed special damages of RM4784 shall carry interest at 4% p.a. from date of accident to date of judgment and thereafter at 8% p.a. until realisation. In respect of the general damages for pain and suffering and loss of amenities, nursing care, psychiatrist counselling and removal of steel plates they still carry 8% p.a. interest from date of service of the writ to date of realisation. There is no interest for loss of future earnings. The defendants have to pay the costs of the proceedings to the plaintiff.

Also found at [1991] 1 CLJ 297